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In the Supreme Court of the United States

OCTOBER TERM, 1988

KEYSTONE LAMP MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly enforced the bargaining order issued by the National Labor Relations Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A9) is unreported. The decision and order of the National Labor Relations Board (the Board) (Pet. App. A12-A26), including the decision of the administrative law judge (Pet. App. A27-A103), is reported at 284 N.L.R.B. No. 74.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1988. A petition for rehearing was denied on July 6, 1988 (Pet. App. A4-A5). On September 20, 1988, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 4, 1988 (Pet. App. A2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures portable lamps at a facility located in Slatington, Pennsylvania. In March 1981, Anita Zinggeler, Jeanette Eckhart, and Darlene DeLong, clerical employees at petitioner's plant, discussed with a representative of the United Steelworkers of America (the Union) the possibility of organizing petitioner's 22 office clerical employees. The Union mailed out blank authorization cards on March 19, and by March 25, some 15 employees had signed and returned their designations to the Union. Pet. App. A32-A33 & nn. 2-3.

Shortly after the March 19 mailing, petitioner embarked on "an antiunion campaign designed to discourage its employees from supporting the Union" (Pet. App. A21). As the Board explained (*ibid.*):

> In the first 3 weeks of the union organizing campaign, [petitioner] threatened to go out of business if the Union won the election, threatened employees with reprisals if they attended union meetings, asked employees to stay away from union meetings, coercively interrogated two employees, ordered an employee to remove her union button whenever she entered [petitioner's] President's * * * office on business, and distributed two questionnaires to all unit employees soliciting their grievances under conditions implying that these grievances would be redressed if the Union lost the election.

On April 6, the Union notified petitioner that it had received signed authorization cards from a majority of the office clerical employees and requested recognition. By that date, 13 employees, a clear majority of the 22 member unit, had designated the Union as their representative. Pet. App. A33 & n.3, A91-A92 & n.60. At the same time, the Union filed a petition for a Board-conducted repre-

sentation election, and an election was scheduled for July 20 (*id.* at A33).

In the three months prior to the election, however, petitioner promised employees that benefits would be improved if the Union lost the election, created the impression that employees' union activities were under surveillance, and laid off three employees who were known to be Union supporters (Pet. App. A21-A22). The Union thereafter lost the July 20 election; of the 22 eligible voters, seven ballots were cast for representation, and 12 were cast against (*id.* at A31). The Union filed objections to the conduct of the election, as well as unfair labor practice charges under Section 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3) and (5). A complaint issued on August 31, 1981. Pet. App. A30-A31.

2. On December 30, 1982, after a hearing on the complaint, the administrative law judge (ALJ) determined that petitioner had engaged in extensive unfair labor practices (Pet. App. A30-A103). The ALJ found that petitioner had violated Section 8(a)(1) of the Act, by threatening to go out of business and to seek reprisals if the employees engaged in union activity, and by promising benefits to the employees if they refrained from union organizing (Pet. App. A95). The ALJ also found that petitioner had violated Section 8(a)(3) and (1) by laying off three of its employees, Elaine Ahner, Jeanette Eckhart, and Betty Lou Phillips, in order to discourage union activity (*ibid.*).

As a remedy, the ALJ recommended that petitioner be ordered to reinstate Ahner and Eckhart, and to make whole both them and Phillips (who had by then been recalled) for any loss resulting from their discriminatory layoffs. In addition, the ALJ determined that a broad cease and desist order should be issued, in light of petitioner's "overall unlawful campaign [which] included a comprehensive pattern of intimidation [and] which not only

threatened the existence of employee rights, but reflected a proclivity to violate the Act * * *." Pet. App. A94. Finally, the ALJ found that as of April 6, 1981, the Union had been designated as the representative of a majority of the employees in the bargaining unit, and that petitioner's "combination of unlawful intimidation, discrimination, and industrial bribery, sufficed to neutralize the effectiveness of conventional Board remedies to create an atmosphere in which it could be considered likely that a fair election could be held in the future" (Pet. App. A91-A93). The ALJ accordingly recommended that petitioner be required to bargain with the Union on request (*id.* at A98).[1]

3. Except in minor respects, the Board adopted the ALJ's findings and concluded that petitioner had violated Section 8(a)(1), (3), and (5) of the Act (Pet. App. A12-A23). It agreed with the ALJ that petitioner had exhibited animus toward its employees' union activities; that Ahner, Eckhart, and Phillips had been "selected * * * for layoff because of their union activities"; and that petitioner's defense of its actions was a "convenient pretext for the[ ] layoffs" (*id.* at A19). The Board also agreed that a remedial bargaining order was appropriate, pursuant to

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[1] The ALJ explained that petitioner's unfair labor practices, including the layoff for discriminatory reasons of three known Union supporters, "not only depleted the ranks from which the Union surely would be expected to draw support, but signaled to all employees in the appropriate unit the lengths to which [petitioner] would go to thwart organization" (Pet. App. A92). Moreover, the ALJ noted, petitioner's solicitation of employee comments, criticisms, and suggestions with respect to supervision, wages, benefits and working conditions "conveyed to every member of the collective bargaining unit the implied message that management policy would be reshaped to conform to their criticisms upon the Union's demise, and amounted to an unfair labor practice which would continue to stir the imagination of employees even after application of conventional Board remedies" (*id.* at A92-A93).

this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). In particular, the Board explained, petitioner's unfair labor practices satisfied that portion of *Gissel* that authorizes the issuance of a bargaining order where there are " 'less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' " (Pet. App. A21 (quoting *Gissel*, 395 U.S. at 614)). The Board noted (Pet. App. A22):

> Threats of plant closure, termination, and other retaliation against union activities are clearly calculated to have a coercive effect that will linger. The termination of three employees certainly would have serious and prolonged consequences. Furthermore, the unit was small, with only 22 employees; the violations were widely disseminated; and the serious violations directly affected almost one-third of the union employees.

The Board accordingly found that "the possibility of erasing the effects of [petitioner's] unfair labor practices using the traditional Board remedies is slight" and that "an election would not reflect uncoerced employee sentiment" (*ibid.*). It concluded that, "in light of the seriousness of the violations and their impact on the entire unit," a bargaining order should issue—notwithstanding the "significant passage of time since the violations occurred" (*ibid.*).

4. On August 28, 1987, following the Board's decision and order, petitioner filed a motion for reconsideration and reopening of the record. In it, petitioner contended that a bargaining order was unwarranted "because the passage of time, employee turnover, and the computerization of unit work have dramatically reduced and altered the composition of the unit and have erased the coercive effects of the unfair labor practices on the present unit em-

ployees" (Pet. App. A11). On September 30, 1987, the Board denied petitioner's motion (*id.* at A10-A11).

5. The court of appeals enforced the Board's order (Pet. App. A6-A9). The court found that "[t]he record * * * fully supports the Board's conclusion that A[h]ner, Eckhart and Phillips were discharged because of their support of the union" (*id.* at A8). It also rejected petitioner's contention that, because conditions had changed since the time of the election, enforcement of the bargaining order should be denied. The court explained that "[w]hile passage of time and turnover may be relevant to the Board's choice of remedy, the Board may nevertheless conclude that past union activity, employer response to such activity, and continuing presence in the bargaining unit of employees subjected to that response, and the continuing presence of the same employer management make a bargaining order appropriate" (*id.* at A8-A9). The court held that "[g]iven the small size of the bargaining unit, the intensity of the employer's anti-union surveillance and interrogation, the severity of penalties inflicted on those union supporters who were discharged, the closure threats, the solicitation of grievances, the presence in the unit of employees who were there at the time, and presence of the same managers, the Board reasonably concluded that the ordinary cease and desist, reinstatement and make whole remedies would not erase the effects of the employer's unfair labor practices in eroding the union's former majority status" (*id.* at A9).

ARGUMENT

The decision of the court of appeals involves the application of settled principles to the facts of this case, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that the Board may issue bargaining orders in two kinds of cases: "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices; and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (*id.* at 613-614). In the first class of cases, a bargaining order may issue even though the union never had majority support; in the second class, a bargaining order may issue "where there is * * * a showing that at one point the union had a majority" and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order * * * " (*id.* at 614-615).

Applying these settled principles, the Board found that the Union had a clear card majority on April 6, 1981, and that its majority status was undermined by petitioner's "extensive and pervasive unfair labor practices" (Pet. App. A20-A21). In particular, the Board found, and the court of appeals agreed (see *id.* at A9), that petitioner's "highly coercive unfair labor practices" were "clearly calculated to have a coercive effect that will linger" (*id.* at A22). It concluded that "the possibility of erasing the effects of [petitioner's] unfair labor practices using the traditional Board remedies is slight" and accordingly that "an election would not reflect uncoerced employee sentiment" (*ibid.*).

Petitioner contends at length (Pet. 8-18) that the court of appeals' decision is in conflict with numerous decisions of other courts of appeals, which have recognized that "subsequent events, such as the passage of time and bargaining unit turnover * * *, lessen the deleterious

effects of an employer's unfair labor practices thereby making a fair election possible" (Pet. 8). The court of appeals acknowledged the same principle, expressly recognizing that the "passage of time and turnover may be relevant to the Board's choice of remedy" (Pet. App. A8). On this record, however, the court of appeals found that the severity of petitioner's violations—coupled with the continued presence in this small bargaining unit of employees who had witnessed the unfair labor practices, as well as the continued presence of the same managers[2]—rendered alternative remedies unlikely to "erase the effects of [petitioner's] unfair labor practices in eroding the union's former majority status" (*id.* at A9). It therefore enforced the bargaining order issued by the Board. In short, the difference between this case and those cited by petitioner is not one of the governing legal standard, but only a difference in the facts of the particular cases. The court of appeals' fact-bound resolution of this case warrants no further review.

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[2] Petitioner concedes (Pet. 5) that employees who had witnessed the unfair labor practices remain in the unit, and petitioner's motion papers before the Board did not allege that *any* of the managerial employees who had engaged in those unfair practices had departed (see C.A. App. 439a-465a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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